IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 126

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,
Petitioner,

vs.

THE HOME SAVINGS BANK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

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Cases Cited.

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STATEMENT.

This action was tried in the Circuit (now District) Court of the United States for the District of Colorado before a jury. (Printed Rec., 20; Rec., 22.)

The issues of fact upon the pleadings were as follows:

1. The plaintiff alleged that the "negotiable bond or certificate of indebtedness" and its second coupon, both set forth *in haec verba,* were, on the twentieth day of February, 1908, duly executed, issued, negotiated and delivered by the defendant to the Federal Ballot Machine Company.

2. That the said Machine Company, prior to maturity of either bond or coupon, sold, negotiated, transferred, endorsed and delivered said "negotiable bond or certificate of indebtedness" and said coupon to the plaintiff for value.

3. That said "bond or certificate of indebtedness" and said coupon were duly presented, payment demanded and refused and protest was made therefor and the same were still due and unpaid. (Printed Rec., 1-6; Rec., 1-6.)

The defendant filed no general demurrer, but answered and afterwards filed its amended answer.

The amended answer set forth three defenses separately stated:

1. A denial of the negotiation and endorsement "of the bond or certificate of indebtedness" or the coupon before maturity for value or otherwise. (Printed Rec., 9, 10; Rec., 10.)

2. The second and third defenses alleged failure of consideration, but the second defense alleged as preliminary matter, "upon information and belief, that the plaintiff is prosecuting this action under an agreement with the Federal Ballot Machine Company or with someone acting in its behalf, but whose name is to the defendant unknown, to the effect that the plaintiff shall be indemnified and saved harmless against the cost and expense of this action, and that the said Federal Ballot Machine Company is the real party in interest in this action." (Printed Rec., 10; Rec., 10, 11.)

After the allegation just quoted, which is not in the third defense, the second defense proceeds in language that constitutes word for word the whole of the third defense as follows:

That the consideration for both instruments has wholly failed; that said instruments were part payment for 150

voting machines under an agreement with the defendant containing a guaranty that the machines should correspond in every particular to the constitution and statutes of Colorado as to holding elections, and that they should accurately and perfectly perform the work of voting machines as required by such constitution and statutes.

That the said machines failed to so conform in a number of alleged particulars which are set forth. (Printed Rec., 10-12; Rec., 11-13.)

A general demurrer to the third defense was sustained by the court, but no exception was asked or entered upon the record by the defendant to this ruling. (Printed Rec., 13; Rec., 14.) The case being at issue upon the complaint and the first and second defenses the cause came on for trial.

From the bill of exceptions taken at the trial by the defendant, now petitioner, it appears that the plaintiff, now respondent, upon the trial introduced its evidence. (Printed Rec., 23-60; Rec., 25-66.)

The plaintiff, although it could have proved the endorsements on the certificate and coupon and then relied upon the legal presumption of holder in good faith for value before maturity, nevertheless went farther, and having proved the endorsements and the authority therefor, then disproved the first defense and the first allegation of the second defense and showed that the certificate with its coupons, *the first of which was afterwards paid by the defendant*, was sold to plaintiff by a bond house in due course of business for value in good faith before maturity, and upon the opinion of counsel (Printed Rec., 53, 54; Rec., 58, 59), without any notice or knowledge of any kind as to any defect in the paper or as to any defense, and the payments of the purchase price

were shown by checks duly paid through the clearing houses. (Printed Rec., 57, 59; Rec., 63, 65.) Proof was made of the demand and protest for non-payment.

Thereupon the plaintiff rested and then the defendant, offering no evidence (Printed Rec., 60; Rec., 66), moved the court for a non-suit "based upon the questions of law already raised by the defendant in the motion to strike parts of the complaint, and again raised in demurrer to the answer" (we quote the bill of exceptions), which motion was denied by the court (Printed Rec., 60; Rec., 66), and the defendant excepted.

Thereupon the defendant moved for a directed verdict on its behalf, which was denied by the court and the defendant excepted (Printed Rec., 60, 61; Rec., 66), and rested without offering any evidence whatever.

Whereupon the plaintiff moved for a directed verdict on its behalf, which motion was granted by the court and judgment ordered to be entered, and thereupon the defendant excepted to such direction and the entry of judgment. (Printed Rec., 61; Rec., 66.)

Both plaintiff and defendant having moved for a directed verdict, there was no question for the jury to pass upon, under the well settled rule in the Federal courts.

Buetell v. *Magone* (1895), 157 U. S., 154.
Pensacola State Bank v. *Merchants' etc. Bank* (1910), 180 Fed., 504.
Bradley Timber Co. v. *White* (1903), 121 Fed., 779.
Mead v. *Darling* (1908), 159 Fed., 684.
Anderson v. *Messenger* (1907), 158 Fed., 250.
Love v. *Scatcherd* (1906), 146 Fed., 1.
West v. *Roberts* (1905), 135 Fed., 350.
Insurance Co. v. *Wisconsin Central Ry. Co.* (1905), 134 Fed., 794.

This is likewise the rule in *Colorado-Saxton* v. *Perry* (1910), 47 Colo., 263.

The errors specified in petitioner's brief at page 8 *as the only ones which are relied upon,* do not refer to any exception taken upon the trial, but are confined to the ruling upon and the sustaining of the demurrer. The errors assigned upon the proceedings had at the trial and contained in the bill of exceptions, on exceptions taken at the trial, and being assigned errors Numbers 6, 7, 8, 9 (Printed Rec., 63; Rec., 69), are to be deemed as waived, since they are expressly disclaimed in the petitioner's brief. The substance of the error now claimed is that the paper was void.

The bill of exceptions affirmatively shows that upon the trial the only points urged for the motion for a nonsuit are the same points as were urged by defendant on the motion to strike out parts of the complaint and again raised upon the argument of demurrer to the third separate defense. (Printed Rec., 60; Rec., 66.)

Those points were denominated in petitioner's bill of exceptions "questions of law" (Printed Rec., 60; Rec., 66), namely, that the instruments sued upon were not negotiable as affirmatively appeared from the complaint. (Printed Rec., 8; Rec., 9.) This motion to strike out the word "negotiable" from the complaint had been denied and no exception taken or settled (Printed Rec., 9; Rec., 10), and the same had been waived by answering.

The motion of the defendant, now petitioner, for an instructed verdict in its favor and the objection of the defendant to the instruction for a directed verdict in favor of plaintiff perhaps raise the question of the legality of the paper, but both errors are now waived.

It thus appears that the court, upon the trial, having overruled the objection as to the void character of the paper, if it was made, on the motions for instructed verdicts, could do nothing less than direct a verdict for plaintiff, but all errors as to proceedings and rulings

and exceptions taken on the trial are now waived by the petitioner. The only point now urged was presented, if at all, to the lower court upon the trial; it could not have been argued on the demurrer to the third defense, which asserted a defense of failure of consideration, but was inconsistent with a claim of the void character of the paper. The lower court ruled on the point, if at all, on the trial. The defendant excepted to the ruling and now waives and abandons the error claimed, but asks to have the same point reviewed on account of a preliminary ruling in the case which does not raise the point, and as to which no exception was saved.

The petitioner now contends in its brief that the point of the void character of the paper was raised upon the argument upon the demurrer but, even if that be so, the court's ruling upon the motion to strike, as well as upon the demurrer, if it involved the point, appears to be wholly immaterial, since the same point could have been raised on the trial.

But since it further appears that the exception to the court's ruling upon the trial upon that very point has now been waived, it follows that the very same ruling made prior to that time before the trial must be considered as waived, as it was immaterial.

By waiving the error assigned that the verdict as directed by the court was contrary to the evidence, which is error Number 9 (Printed Rec., 63; Rec., 69), it follows that it is now admitted by the petitioner, then defendant, that the evidence justified the verdict and the judgment.

We make this preliminary statement to show that there is nothing for this court to pass upon, and that the writ of certiorari has presumably been granted upon the record on account of the unnecessary ruling in the opinion of the Circuit Court of Appeals to the effect that an exception entered on the record is necessary to the review of a ruling sustaining a demurrer to a plea or statement of defense, although it does appear that that ruling is wholly immaterial, when the record is examined.

I.

SECTION 8 OF ARTICLE VII OF THE CONSTITUTION OF THE STATE OF COLORADO, AND SECTION 2342 OF THE REVISED STATUTES OF COLORADO, AUTHORIZED THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER TO ISSUE NEGOTIABLE CERTIFICATES OF INDEBTEDNESS FOR VOTING MACHINES; THE CERTIFICATE AND COUPON HERE SUED UPON WERE PROPERLY ISSUED AS NEGOTIABLE PAPER, AND TO THEM IN THE HANDS OF A BONA FIDE INDORSEE FOR VALUE BEFORE MATURITY THERE IS NO DEFENSE.

Passing for the present the question whether under the rulings of this court the order sustaining the demurrer to the third defense pleaded, which order did not eventuate in a judgment, is reviewable without an exception taken and reserved on the record; and passing likewise the point whether the matter now claimed was presented to the lower court on the argument of that demurrer, we proceed to the merits of the controversy here, which is one purely of law. For, if the power was given the petitioner to issue this paper, negotiable in form, all other questions are immaterial and the verdict and judgment must stand.

Assuming that all questions of practice were out of the case, the only error upon which the petitioner predicates its argument for reversal is the overruling by the trial court of the demurrer to the third defense. That defense was one of failure of consideration, and nothing more. The petitioner claims only that that defense of failure of consideration raised the legal issue of whether the certificate sued upon was in fact, as well as in form, negotiable; and that that issue raised necessarily the question of the power of the petitioner to issue a negotiable certificate of indebtedness.

Assuming, then, that all of the questions raised by the demurrer to the third defense are properly before this court—and the petitioner could not, and does not, claim that any other questions can be passed upon here—there are involved two ultimate legal questions in respect of the certificate upon which suit was brought:

1. Was the petitioner authorized by the law of Colorado to issue negotiable certificates of indebtedness?

2. Assuming that it did have that power, was the certificate here sued upon in form a negotiable instrument?

We do not apprehend that it will be denied that if these two queries be answered in the affirmative, the respondent's right to recover will have been conclusively established, as will, of course, the correctness of the judgment of the lower court. For in such a case, failure of consideration—the sole ground relied upon in the third defense—would furnish no defense to an action. It may be well to remark parenthetically at this juncture that not only did the third defense not proceed upon the theory that the respondent was not a bona fide holder in due course, but the respondent proved affirmatively that it was a bona fide holder in due course. That question is no longer open, nor does the petitioner claim it to be.

That in our statement of the ultimate legal questions which the petitioner claims are involved herein we have given the petitioner the benefit of every doubt is apparent from a comparison of our statement with that found in the petitioner's brief. Thus, at page 6, counsel say:

> "The third defense was sufficient in law solely and only upon the theory that the certificate of indebtedness sued upon was not negotiable. Whether the certificate was negotiable depended *solely and exclusively upon the question of the power and authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness* under the laws of the state of Colorado. *If the law gave said*

Board the power to issue a negotiable certificate of indebtedness, the third defense was not sufficient in law."

The question of the *power,* therefore, of the petitioner to issue a negotiable certificate of indebtedness is the question attempted to be raised by the petitioner; as a practical matter, that is the only question in the case—assuming it to have been properly brought here—for the other question which we have suggested, namely as to whether the certificate was negotiable in form, is answered equally unequivocally by the admission of counsel and the most cursory examination of the instrument itself.

But first as to the question of power.

The power of the Board to purchase voting machines is admitted in petitioner's brief, at page 43. The pleadings in the case nowhere deny the making and issuance of the certificate by the Board, and it is conceded by the petitioner on page 43 of its brief that the defendant is the governing body of the city and county of Denver in its capacity as a county, and that the certificate was issued by the defendant. The second and third defenses affirmatively pleaded the making of a contract by the defendant for these machines and the issuance of the paper in payment therefor.

It is conceded by the petitioner that the language of the Eighth Section of the Constitution of Colorado, and of Section 2342 of the Revised Statutes of Colorado of 1908, conferred power upon the petitioner to issue bonds. That language is as follows:

> "When the governing body of any * * * city and county * * * shall adopt and purchase * * * voting machines, such governing body may provide for the payment therefor by the issuance *of interest-bearing bonds, certificates of indebtedness, or other obligation,* which shall be a charge upon such * * *

> city and county * * *; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par."

Passing, for the moment, the distinction attempted to be drawn by the petitioner between bonds and the obligations actually issued, it is indisputable that *the power so conferred upon the petitioner to issue bonds was the power to issue negotiable bonds.* On that point the authorities are unmistakable, and the petitioner virtually concedes (at page 48 of its brief) that this is the law.

In *D'Esterre* v. *City of Brooklyn* (1898), 90 Fed., 586, it was held that a statute authorizing the issuance of bonds by municipalities will be construed as giving power to make them negotiable in the absence of provisions clearly showing a contrary intention. In that case the court said, at page 590:

> "An examination of the enabling statutes would illustrate that power to issue negotiable bonds is seldom, if ever negatived. This condition exists for the very sufficient reason that such bonds are intended to pass by delivery or by endorsement, in order to give them marketable value. The bonds of a municipality payable, as are these in question, after a long interval of time, would meet neither with ready sale nor the most valuable return to the town if they were subject to all of the possible defenses to which non-negotiable paper is exposed. The statute under consideration authorized a general issue of bonds and in the absence of restrictive words, the power would be implied to give them a negotiable form."

In *Ashley* v. *Board of Supervisors* (1893), 60 Fed., 55, the Circuit Court of Appeals for the Sixth Circuit had the same question under consideration. Legislative authority had been conferred upon a municipal corporation to issue bonds, but nothing was said as to the nego-

tiability of the bonds so to be issued. As to this the court said, at page 67:

> "It is further objected that the act of 1885 did not authorize the issue of bonds negotiable in form, the contention being that that requires express authority whereas this statute authorizes the issue of bonds without more; and the cases of *Merrill* v. *Monticello*, 138 U. S., 673, and *Brenham* v. *Bank*, 144 U. S., 173, are cited, in which it was held that a statute authorizing a municipality to borrow money did not by implication carry with that authority the power to issue negotiable bonds. In the present case the power is given to issue bonds running for a long period of time and bearing interest, and it appears on the face of the act that the bonds might be put upon the market and sold. We cannot doubt that negotiable bonds were intended. The same question was made in the Cadillac case above referred to; and it was held by this court upon a statute of like kind, though not quite so clear in its implication, that the power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations, and that the doctrine of *Brenham* v. *Bank*, did not apply."

In *City of Cadillac* v. *Woonsocket Inst. for Savings* (1893), 58 Fed., 935, the Circuit Court of Appeals for the Sixth Circuit, composed of Mr. Justice Brown and Judges Taft and Lurton, held that statutory power to issue bonds includes the power to make the bonds negotiable. In that case Judge Lurton, later Mr. Justice Lurton, in delivering the opinion of the court, said, at page 937:

> "The first defense interposed is that the City of Cadillac had no power to issue negotiable bonds, and that the holder of these bonds is not therefore protected against any defense which the city can make."

After quoting the provisions of the statute under which the bonds purported to have been issued, and which provide merely that "the bonds of the city may be issued

bearing a legal rate of interest," the court continued, at page 937:

> "This act clearly authorizes the issuance of 'bonds' bearing a legal rate of interest for any loans lawfully made. * * * That this contemplates, and by necessary implication authorizes the issue of negotiable bonds, we have no doubt. The general power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations. That usual form embodies a contract and obligation negotiable in its terms. The case of *Brenham* v. *Bank*, 144 U. S., 173, has no bearing upon this question. Nothing more is there decided than that an act empowering a city to 'borrow for general purposes not exceeding $15,000 on the credit of the city,' did not authorize the issuance of negotiable obligations for the money so borrowed. Here the power to issue obligations by necessary implication in the usual commercial form of bonds, is expressly given. But one meaning can be fairly deduced from the terms of the act. The question now presented was not discussed in the Brenham case, and we have no doubt whatever as to the conclusion we have announced."

The Supreme Court of the United States in the case of *County of Carter* v. *Sinton* (1887), 120 U. S., 517, 30 L. Ed., 701, reached the same conclusion.

In that case suit was brought to recover on certain bonds and interest coupons issued by the County of Carter, pursuant to an act authorizing the County of Carter to subscribe $75,000 to the stock of a certain railroad company, and "to issue its bonds to raise the money to pay therefor." The bonds were issued negotiable in form and passed into the hands of *bona fide* purchasers for value before maturity. It was objected on behalf of the county that the county was without power to issue negotiable bonds which, in the hands of innocent holders, would be free from the equitable defenses which

would be good as between the original parties. As to this the court said, at page 703 (of Lawyers' Edition):

> "It is no doubt true that without sufficient legisaltive authority a municipality cannot issue commercial paper which will be free from equitable defenses in the hands of innocent holders; but in our opinion that authority was given here. The County of Carter was authorized to borrow money and to issue its bonds therefor to pay its subscription to the stock of the railroad company. *This all agree was sufficient authority to issue bonds which were negotiable,* and the averments in the declaration are that the bonds which were in fact issued had that character."

To the same effect are

Gelpcke v. *Dubuque* (1864), 1 Wall., 175.
Gunnison v. *Rollins* (1899), 173 U. S., 255.

Judge Dillon on Municipal Corporations, 5th Ed., says at sec. 882:

> "If express power be conferred upon a municipality to issue bonds bearing interest, this contemplates, and by necessary or reasonable implication authorizes the issue of negotiable bonds. A non-negotiable bond is no more serviceable to the holder than the ordinary warrant—the usual voucher issued in liquidation of ordinary expenditures of the municipality—and if a bond is to be endowed with an enlarged value, the only manner in which it can be done is to give it negotiability so as to impart to it the quality of commercial paper, and thereby cut off equities in the hands of innocent purchasers for value. * * * The general power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations. The usual form embodies a contract and obligation negotiable in its terms. Money may be borrowed by a city upon a non-negotiable instrument, but in order to obtain advantageous competition for the use of money, it must issue commercial paper. *Therefore, when power to issue bonds is expressly conferred, the municipality has of necessity or by fair construction the power to give to these bonds the usual commercial attributes of negotiability.*"

In support of this statement of the law the author cites, among others, the following cases:

Rathbone v. *Hopper*, 57 Kan., 240.
Vicksburg v. *Lombard*, 51 Miss., 111.
Lexington v. *Union Nat. Bank*, 75 Miss., 1.
Klamath Falls v. *Sachs*, 35 Ore., 325.
Austin v. *Nalle*, 85 Tex., 520.
Winston v. *Ft. Worth* (Tex. Civ. App.), 47 S. W., 740.
Jefferson v. *Jennings Banking, etc. Co.*, 35 Tex. Civ. App., 74.

It is equally beyond dispute that at the time the certificate here sued upon was issued—as well as now—the rule of law for which we have been contending prevailed both in the Federal Courts of the Eighth Circuit and in the state courts of Colorado.

The leading case in the Eighth Circuit is *West Plains Township* v. *Sage* (1895), 69 Fed. (C. C. A.), 943. In that case the municipality had been given power to issue bonds for certain designated purposes. Negotiable bonds were issued, reciting that they were issued for the purpose for which they were authorized, whereas they were in fact issued for an unauthorized purpose. The township sought to avail itself of this defense against a *bona fide* purchaser. Conceding that the defense would be good, except as against a *bona fide* purchaser, the question was squarely presented whether the bonds were negotiable. This, of course, raised the question of the power of the township, under the statutory authorization, to issue negotiable bonds. As to this the court said, at page 948:

> "The objection that the act under which these bonds were issued gave no authority to the township to issue negotiable bonds is, in our opinion, untenable. In the cases of *Merrill* v. *Monticello*, 138 U.

S., 673, 11 Sup. Ct., 441; *Hill* v. *Memphis*, 134 U. S., 198, 10 Sup. Ct., 562, and *Brenham* v. *Bank*, 144 U. S., 173, 12 Sup. Ct., 559, cited in support of this objection, and in the cases referred to in the opinions in those cases, none of the acts there under consideration authorized the municipal bodies to issue bonds at all; and the extent to which those decisions go is to hold that the power to issue negotiable bonds is not to be implied from the limited power to borrow money or to incur indebtedness. The act under consideration in this case authorized this township to 'issue new bonds,' without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual—nay, it may almost be said the universal—form of such securities is that of a negotiable bond payable to bearer; and. in our opinion, it was bonds in this form, and in no other, that the legislature of Kansas had in mind and intended to give this township power to issue by this act."

So far as we have been able to discover, the doctrine of this case never has been questioned, and, on the contrary, the rule of law has been repeatedly reaffirmed and the case cited with approval, particularly by the Circuit Court of Appeals for the Eighth Circuit.

In *Geer* v. *Board of Comrs.* (1899), 97 Fed., 435, bonds were upheld in the hands of *bona fide* purchasers on the theory that they were negotiable, although the statutory authority provided merely for the issue of "bonds" without reference to their negotiability. That this question was a vital one in the case is apparent from Judge Caldwell's dissenting opinion, where he said—still adhering to his dissenting view in the *West Plains Township* case:

> "I dissent from the reasoning and conclusion of the court on the 'seventh defense' [which was a defense of want of consideration], and, in support of my dissent, refer to my dissenting opinion in *West*

Plains Tp. v. *Sage*, 69 Fed., 943, and the cases there cited."

Finally, in *Hughes Co.* v. *Livingston* (1900), 104 Fed., 306, even Judge Caldwell, who theretofore had dissented as in the *West Plains* case, seems to have come to regard the law as settled in accordance with the majority opinion in *West Plains Tp.* v. *Sage, supra.* In any event the Circuit Court of Appeals for the Eighth Circuit seems to have been unanimous in following the *West Plains* case. The power to issue bonds was held there without any discussion to be the power to issue negotiable bonds.

West Plains Township v. *Sage, supra,* was followed in *Howard* v. *Kiowa County* (1896), 73 Fed., 406, and in *Waite* v. *City of Vera Cruz* (1898), 89 Fed., 619. In the latter case the court said at page 633:

> "The statute under which the bonds in suit purport to have been issued authorized the defendant, upon conditions named therein, to issue bonds for the purpose of refunding that part of its indebtedness evidenced by bonds and warrants. *The authority thus given must be construed as one to issue negotiable bonds in the usual form."*

The same view of the question was taken by the Supreme Court of the United States when the case was carried there. (184 U. S., 302.)

Such, too, is the law of Colorado, as was held by the case of *City of Cripple Creek* v. *Adams* (1906), 36 Colo., 320. This case is important, not only as bearing directly on the point with which we are immediately concerned, but because of its marked similarity to the case at bar and the applicability here of the general principles it announces.

Pursuant to statutory authority to issue bonds the town of Cripple Creek issued certain negotiable bonds for the purpose of purchasing water rights. The bonds sued

upon had passed into the hands of bona fide purchasers, against whom the defense of failure of consideration was sought to be utilized. As to the contention that the failure of consideration for the bonds, by reason of the failure of the title to the water rights, in consideration of which they had been issued, was fatal to the bonds, the court said at page 326:

> "The town of Cripple Creek authorized the issuance of these bonds, stated the consideration upon which they were to be issued—that is, in payment of water rights—and stated how the bonds should be authenticated, in other words, by the ordinance pursuant to which the bonds were issued. The town of Cripple Creek authorized the issuance of the bonds and left to the Board of Trustees to determine the existence and sufficiency of the consideration for which the bonds should issue. It further told the public by this ordinance when it could put faith in the bonds—that is, when they should be authenticated by the signature of the Mayor, Clerk and Treasurer. The bonds, when issued, were an unconditional promise to pay a certain sum of money at a definite time. The coupons attached thereto were of like effect. The city had the power to issue them. Before the maturity of the bonds or coupons, they were purchased by plaintiff for a valuable consideration and without notice or knowledge of the infirmity therein.
>
> "Municipal bonds are clothed with all the attributes of negotiable or commercial paper, pass by delivery or endorsement, and are not subject to equities (where the power to issue them exists) in the hands of holder for value before due without notice. Dillon's Municipal Corporations, Vol. 1 (Third edition), Sec. 486. 'Such securities are made to raise money by their sale and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of bona fide holders.' "

The authority in Section 935 of Mills' Annotated Statutes of Colorado, for a county to issue coupon bonds of the county, does not provide for negotiable bonds. Nor

does the authority in Section 939, Mills' Annotated Statutes of Colorado, for a county to issue bonds for funding certain indebtedness mention negotiable bonds, yet negotiable bonds are issued thereunder. The bonds issued by the County of Gunnison, in the State of Colorado, issued under Section 6, Article XI of the Colorado Constitution, which does not mention negotiable bonds, but which merely authorizes the issuance of bonds, have been held by this court to be negotiable bonds.

Gunnison County v. *Rollins* (1899), 173 U. S., 255.

It is perfectly immaterial, therefore, whether the question we are discussing be treated as a question of the construction of a Colorado statute, upon which the decisions of the Supreme Court of Colorado should be controlling, even in this court; or, as has been more frequently said, as a question of general commercial law, in the decision of which the United States courts are unhampered by the rules of decision in the State courts. For, treated in either way, the answer is the same. The power given to a municipal corporation to issue bonds is the power to issue negotiable bonds.

But, says the petitioner at this point, the Board of Commissioners did not in fact exercise any power that may have been granted to it to issue negotiable bonds; what it actually issued was certificates of indebtedness; and whatever may have been its power in respect of bonds, it had no power to issue *negotiable certificates of indebtedness.* The narrow ground taken, then, is that while the Constitution and statute authorized the issuance of negotiable paper for the purpose of providing for or paying the purchase price of those machines, *so long as the name given to the paper issued was "bonds,"* they did not authorize the issuance of such negotiable

paper *if the name given to the paper* is that of *"certificates of indebtedness."*

To this contention of the petitioner there are, even aside from the manifest absurdity of the proposition on its face, several distinct answers, each of which is quite sufficient by itself.

First, the distinction sought to be drawn between bonds and certificates of indebtedness is wholly illusory. As a matter of fact, a bond in the ordinary form of municipal bonds is nothing more nor less than a certificate of indebtedness with a negotiable promise to pay. The certificate of indebtedness here in question is, as a matter of fact, a bond. The certificate recites the value received by the defendant and then contains a promise in one year to pay *to the order of* the Federal Ballot Machine Company the sum of $11,250 with interest on this sum from the date thereof at the rate of five per cent. per annum; the said interest being payable semi-annually as per two coupons thereto attached. The fact that the value received as the consideration for the issuance of the bond is expressed in the body of the bond and the fact that the paper is under seal, do not detract from its character as a negotiable bond. The cases are numerous in regard to such bonds:

Gelpcke v. *Dubuque* (1864), 1 Wall., 175.
Mercer County v. *Hackett* (1864), 1 Wall., 83.
Humboldt Tp. v. *Long* (1876), 92 U. S., 642.
Provident Life Company v. *Mercer County* (1898), 170 U. S., 593.

The above are all cases where the consideration is expressed in the bond and the bond is under seal.

Likewise in the *City of Cripple Creek* v. *Adams*, discussed *supra*, the bonds in question contained similar re-

citals. There, after the promise to pay, the bond recited as follows:

> "This bond is one of a series of bonds of like tenor and date which the said town of Cripple Creek has issued for the purpose of purchasing water rights necessary to supply said town with water in pursuance of an ordinance of said town of Cripple Creek duly and in due time, form and manner adopted, published and made a law of the said town; * * * and it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of this bond to render the same lawful and valid, have been properly done, happened and performed in regular and in due time, form and manner as provided by law. * * * In testimony whereof the said town of Cripple Creek has caused this bond to be sealed by its corporate seal, signed by its Mayor, attested by its Clerk and countersigned by its Treasurer, this tenth day of October, A. D. 1895."

It was held that the recitals in the bond did not affect the validity or the negotiability of the bonds or coupons attached thereto.

Technically the distinction between a bond and other promise to pay a certain sum of money on a certain day, is that the bond is a sealed instrument or what is called at the common law a specialty. This particular instrument sued upon is, of course, an instrument under seal. Therefore, the whole argument made by the petitioner amounts to this, that while it is conceded that the board had power to issue a negotiable bond and while the board did, as a matter of fact, issue a negotiable bond with coupons for interest attached, which are negotiable in form, nevertheless because the instrument was called "a certificate of indebtedness," the instrument must be declared to be one issued without authority, on the ground that while there does appear to be express authority to issue negotiable bonds there is no express authority to issue negotiable certificates of indebtedness. We submit

that such an argument is entitled to no consideration, for it makes the whole question depend on the mere name given to the paper.

Historically speaking, the term "certificate of indebtedness" or "certificate of loan" is and imports a negotiable instrument. And the courts themselves have declared substantially that a certificate of indebtedness is a bond in the sense that it is a negotiable obligation, provided it contains a promise to pay a sum certain at a time certain to the order of a person certain or to bearer made by a person certain (using person to include artificial persons).

In the case of *Amey* v. *The Mayor* (1861), 24 How., 364, certain obligations of Allegheny City, Pennsylvania, which were denominated "certificates of loan," came under consideration. The city was permitted by an act of the legislature to subscribe for stock of a railroad company to be paid for by certificates of loan. Later another act was passed, authorizing the city to increase its subscription upon the terms and conditions of the original subscription, provided no bond for the payment of the subscriptions should be issued of a less denomination than one hundred dollars; and the court held that this proviso was merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than one hundred dollars, and the word "bond" was held to mean "certificate of loan." The court in commenting upon this situation, said (page 370):

> "The subscriptions of the defendants were made under the acts of the 5th April, 1849, and that of the 14th of April, 1859. The first permitted a subscription of $200,000, to be paid for by 'certificates of loan.' The second permitted the increase of it, to an amount not exceeding the first, without, however, having altered the manner in which the corporate credit of the city was to be used for the payment of

the second subscription. We infer from the words of the act, and do not see how it can be otherwise, that it was to be paid for by the *same certificates of indebtedness* which the legislature had directed to be issued and used for the payment of the first subscription. The act is, 'that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the said Ohio and Pennsylvania Railroad Company to any amount not exceeding the subscription heretofore made by the said city, upon the terms and conditions prescribed in regard to said previous subscription; provided no bond for the payment of the subscription shall be issued of a less denomination than one hundred dollars.' This proviso is merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than $100; and the words 'no bond for the payment of the subscription shall be issued,' when considered in connection with the act authorizing the second subscription, that it should be made 'upon the same terms and conditions of the first' cannot be interpreted into a permission or direction of the legislature, that the city might use in payment for the stock any other legal or commercial instrument than '*certificates of loan.*' Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as '*certificates of loan,*' with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest—a coupon bond—*coupon* being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

"Such certificates of loan have been resorted to

for many years in the United States to raise money for internal improvements. They were as well known and used in Pennsylvania as elsewhere, and were permitted to be issued in that state, by just such enactments as those which authorized the city of Allegheny to subscribe to the capital stock of the Ohio and Pennsylvania Railroad Company. Such an issue was applicable to the subject matter of legislation. The city solicited the state to be allowed to make the subscriptions. It was the policy of the state to grant the application. The subscriptions were made under the act of the 5th April, 1849, and that of the 14th April, 1859. The first permits a subscription of $200,000 which was to be paid for by certificates of loan. The act of the 14th April, 1859, allowed the increase of the subscription to an amount not exceeding the first, upon the same terms and conditions. It was the understanding of the legislature, of the city, and of the railroad company, that the subscriptions were to be paid for by the corporate credit of the city by the issue of 'certificates of loan.' That appears from the act of 1849, authorizing it, before the subscription was in fact made. That act provides, in anticipation of its being done, that the certificates of loan which shall hereafter be issued by the city of Allegheny in payment of any subscription to the Ohio and Pennsylvania Railroad Company were to be exempt from all taxation, except for state purposes. The railroad company took from the city certificates of loan in payment of the subscriptions, sold them as such, and with the money built the road. Such a concurrence of contemporaneous action by all the parties interested in the subject matter of legislation proves that it was the intention of the legislature that the authority given to the city to make the subscriptions to the railroad company had been carried out just as it was meant to have been.

"We answer, therefore, that the several acts of assembly stated in the agreed case did confer authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its first and second sub-

scriptions to the capital stock of the Ohio and Pennsylvania Railroad Company."

In the case of *Humboldt Tp.* v. *Long* (1876), 92 U. S., 642, an instrument of the tenor following:

"Be it remembered that Humboldt Township, in the County of Allen and State of Kansas, is indebted to the Fort Scott and Allen County Railroad Company, or bearer, in the sum of $1,000 lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first days of June in each year, at the banking house of Gilman, Son & Co., in the City of New York, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable on the thirty-first day of December, A. D. 1901, at the banking house of Gilman, Son & Co., in the City of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen Railroad, and for the construction of the same through said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and provide for the payment of the same, approved February 25, A. D. 1870'; and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue and resources, is pledged.

In testimony whereof, this bond has been signed by the chairman of the Board of County Commissioners of Allen County, Kan., and attested by the county clerk of said county, this twelfth day of October, 1871.

Z. WISNER,
Chairman County Commissioners.

Attest:
W. F. WAGGONER,
County Clerk."

was declared to be in terms a certificate of indebtedness, and to be negotiable.

In that case Mr. Justice Strong said with reference to the instruments in question:

> "They are *certificates of indebtedness* to the railroad company or bearer, each for $1,000."

In *Christie* v. *City of Duluth* (1901), 82 Minn., 202, 84 N. W. Rep., 754, the Supreme Court of Minnesota has declared that "a bond is one form of certificate of indebtedness." In that case the city was authorized

> "to provide for the payment of its debts and expenses; to borrow money on its credit for city purposes and to issue bonds therefor; to issue bonds in the place of and to supply means for paying maturing bonds, and to consolidate or fund the same: * * * Provided, however, that the certificates of indebtedness issued for the creation and maintenance of a permanent improvement revolving fund shall not be considered as a portion of the indebtedness of the city for the purposes of this section."

It was also provided by another section of the ordinance that bonds shall not be issued for any purpose to the amount of $100,000 or over without submission to the legal voters.

It was charged in the complaint that an issue of $99,000 permanent improvement revolving fund bonds had been authorized, that the city was proceeding to sell the same, and that such issue was in excess of the legal limit. The only reference in the enabling act to such a fund was that above quoted, to wit: "Provided, however, that the certificates of indebtedness issued for the creation and maintenance of a permanent improvement revolving fund shall not be considered as a portion of the indebtedness of the city for the purposes of this section." It was contended that, in the absence of a specific definition of such a fund, defining its scope and limitations, the charter provisions with reference thereto were void; and further that, if the enabling act authorized such a fund for the

purposes named in the charter, bonds could not be issued for such purposes, *but only certificates of indebtedness*—that form of obligation being the only evidence of indebtedness recognized by the enabling act; and the court said (page 203):

> "These objections do not seem to be very forcible. While the language might have been more explicit, there is no reasonable doubt as to its application. It refers to such local improvements as all cities are charged with by way of assessment of the cost upon all property benefited thereby. It is the plain intent of the act to permit cities to establish a revolving fund for the purpose of meeting the expenses of such improvements until funds are realized through the regular channel of assessment and collection. The term 'certificate of indebtedness,' as used in this connection, is equivalent to the term 'bond.' A bond is one form of certificate of indebtedness, and the provision wherein this term is used should be considered in connection with the power to issue bonds up to $100,000, found in the latter part of the section. If a 'certificate of indebtedness,' as employed in the act, refers to some special form of obligation different from a bond, the act is silent upon that subject, and, without reference to the subsequent provision referred to, the language would be indefinite and ineffectual for any purpose."

It would seem from these authorities that the term "certificate of indebtedness," unless limited by apt and express words, is to be taken as meaning a negotiable obligation.

Since, therefore, the petitioner had power to issue negotiable bonds; and since the certificates which it issued are in form and in substance negotiable bonds, it follows that petitioner's argument that the certificate here involved was issued without authority is without foundation. That at the time the certificates of indebtedness were issued the law of Colorado and of the Eighth Circuit—as well as the law obtaining in the Federal courts generally

—was as we have stated it, there can be no doubt; and it must be assumed, therefore, that the certificates were sold upon the strength of the existing rule of law. We submit that the certificate of indebtedness here involved is a bond, and that the petitioner in making the bond negotiable was acting in pursuance of the statutory authority, interpreted either in the light of authoritative judicial precedents or of commercial usage and common sense; and that therefore, the certificate was not issued without lawful authority.

The second answer, too, to the petitioner's contention is found in the words of the constitutional and statutory provision, upon which the authority to purchase voting machines and provide for the payment therefor was predicated. The constitution and the enabling statute provide that "bonds, certificates of indebtedness or other obligations" may be issued.

On the principle of *noscitur a sociis*, or what is very much the same thing, the principle of *ejusdem generis*, since it is conceded that the word "bonds" in this connection means negotiable bonds, it follows necessarily that the certificates of indebtedness authorized to be issued are negotiable certificates.

Endlich Interpretation of Statutes, Sec. 400, and cases cited.

We have seen that the interest-bearing bonds authorized by amended Section 8 of Article VII of the Constitution of Colorado are negotiable bonds, and consequently if the certificates of indebtedness there authorized are limited to the same general class as bonds, if they are interest bearing and are a charge upon the city and county of Denver and could have been sold in the open market for the purpose of procuring money with which to pay for voting machines, then they possess and are in-

tended to possess all the characteristics and attributes of negotiability which the bonds authorized were intended to possess.

Moreover, the remaining language of the provision bears out completely the idea that the certificates of indebtedness, as well as the bonds, should have the attributes of negotiability, at least if the governing body desired to give them those attributes. For instance, the certificates of indebtedness or other obligations may be made payable at any time, not exceeding ten years from their date, but "shall not be issued or sold at less than par." If by "certificates of indebtedness" nothing but ordinary municipal "warrants" had been meant, it would have been absurd, of course, to talk of not "selling" them "at less than par." Such warrants would be transferable or assignable, but not strictly the subject of sale; nor could the word "par" be applied to them with even approximate accuracy. "Par" is a technical expression, denoting the face value of bills of exchange, shares of stock or other *negotiable* or quasi-negotiable securities.

Finally, the petitioner's argument by which it seeks to show that the instrument here sued upon was issued without authority proceeds from an entirely unsound premise. The argument proceeds upon the theory that to hold that the petitioner had the authority to issue negotiable certificates of indebtedness would be to reach such a conclusion in the absence of any express authority to issue negotiable paper, and invokes the aid of the rule of law that "any doubt of the existence of such power ought to be determined against its existence." The difficulty with petitioner's argument is that it overlooks entirely the foundation of the rule which it seeks to invoke—which had its genesis in the desire of the courts to prevent abuse of power by municipal corporations.

That the argument does overlook the consideration we have just suggested is not unnatural, since it overlooks the fact that in this case *the petitioner actually was given the power to issue negotiable paper—in some form—to provide for the payment of voting machines.*

The theory upon which the general rule of construction for which the petitioner contends proceeds is that it will not be assumed, in the absence of a fairly clear expression by the legislature, that the legislature is willing to permit its agency, a subordinate municipal corporation, to issue negotiable securities many defenses to which, in the hands of innocent purchasers, will be cut off. In other words the rule is one of expediency, the courts refusing to presume the existence in a municipal corporation of power to issue negotiable securities in the absence of express or reasonably implied authority from the superior legislative body.

And it is to that point that the reasoning and language in all of the cases cited by the petitioner are addressed.

For instance, in *Brenham* v. *Bank* (1892), 144 U. S., 173, a case strongly relied upon by the petitioner, the court used the following language, quoted by the petitioner:

> "It is easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds, and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

The rule which the petitioner seeks to invoke here was clearly applicable in that case, for there there was *nowhere* anything conferring authority upon the City of Brenham to issue negotiable securities for general purposes (for which the bonds had been given). The question there was: Did the city have power to issue nego-

tiable securities for this purpose? And it was held that it did not, on the theory that if the legislature had desired to permit the city to issue negotiable securities and thus cut off equitable defenses thereto in the hands of bona fide purchasers that desire must be clearly expressed.

The reason for the rule is stated even more clearly by Judge Thayer in the quotation reproduced by the petitioner from *Coffin* v. *Board of County Commissioners* (1893), 57 Fed., 137:

> "Finally, it is proper to call attention to the rule of law which requires the authority of a municipal corporation to issue negotiable paper to be clearly made out and established, whenever the existence of such a power is called in question. A power of that nature will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it."

The citation in support of petitioner's present contention of these cases and of the rule of law they reaffirm indicates clearly, as we have suggested, a complete failure to comprehend the reason of that rule of law. Obviously, as soon as it is made to appear, as in this case, that the legislature *has* actually and clearly conferred upon the municipality power to issue negotiable securities *for the very purpose in question*, the rule laid down by the cases cited by the petitioner ceases to have the slightest applicability. All that the courts have said is this: When there is any doubt as to whether the principal has given its agent the power to issue negotiable paper to provide for the payment of voting machines, we shall protect the principal by finding against the existence of that power; but when the principal has indicated its willingness that the agent shall exercise that power, our concern is at an end.

If it be true, therefore, that the petitioner had the power to issue negotiable bonds—a power which cannot be seriously questioned—this case is at once removed from the application of the rule relied upon. For, in such a case, the power *to issue negotiable paper*—which is the *only* power the courts have been reluctant to infer from uncertain legislative expression—is conclusively established. Moreover, the power thus established is the power to issue negotiable securities *for the precise purpose for which this certificate was issued.* That delegation of power discloses indisputably the legislative policy with reference to the power of the petitioner to buy voting machines and to provide for their payment by the issuance and sale of negotiable paper.

The legislature, having in mind the rule of law which construes "bonds" in such a case to mean "negotiable bonds" said to the petitioner: "You may buy voting machines and issue negotiable obligations to provide for their payment." That declaration settled the question of power. Then, as a mere detail, unconnected with the question of power—and rather by way of making unlimited than of limiting the form of negotiable obligations which might be utilized—the legislature said that they could be in the form of bonds, certificates of indebtedness *or other obligations.* Once it is shown that there was *any* power to issue negotiable paper, it seems so clear as to be not a proper subject for argument that the petitioner was vested with absolute discretion as to the form of the obligations which it should issue. Doubtless it could have issued non-negotiable paper if it had wished; and so could it issue negotiable paper if it wished. To it was given the choice; it was left unhampered by the legislature.

If in the statute no mention had been made of bonds,

and only "certificates of indebtedness or other obligations" had been specifically referred to, it still would have been open to argue with much plausibility that in view of the practical necessities which the legislature would be deemed to have had in mind in passing the enabling act, the power was given to issue *negotiable* obligations. And that argument we submit, would be entitled to prevail notwithstanding the necessity, in such a case, of rebutting the supposed presumption that a municipality has not the power to issue negotiable securities unless the intention to confer that power be clearly indicated. But in this case there is no such uncertainty. The legislature has completely satisfied the supposed presumption by giving power to issue *negotiable* bonds. The respondent's authority then reads:

> "may provide for the payment therefor by the issuance of *negotiable* interest-bearing bonds, certificates of indebtedness or other obligations, which shall be a charge upon such city and county. * * *"

As stated by the petitioner (Brief, p. 55), the hardship which the courts have attempted to prevent by indulging a presumption against the existence of the power to issue negotiable paper is

> "utterly to deprive taxpayers of a municipality of any defense against the collection of obligations, such as the certificate in question, although the consideration for the issuance of such an obligation has utterly failed."

Whether the legislature desires to do that, and thereby procure for the municipality the advantages which can be obtained only through the medium of negotiable paper, is a question of legislative policy. When, as here, the legislature has decided that question in the affirmative, and has said clearly that one form of negotiable paper, which will subject the taxpayers to the hardships portrayed by the petitioner, may be issued, the question

is answered. The municipality has, and is unmistakably intended to have, the power to issue negotiable obligations. And, of course, once that is conceded, it becomes immaterial so far as an argument based on the hardships that will follow the granting of the power to issue negotiable paper in any form is concerned, whether the obligations are called "bonds" or "certificates of indebtedness."

More than that, the petitioner's construction of the Eighth Section of Article VII of the Constitution of Colorado and of Section 2342 of the Revised Statutes of Colorado of 1908, which reproduces the exact words of the Constitution, cannot be justified from the words of the statute or the Constitution. Those words are:

> "When the governing body of any * * * city and county * * * shall adopt and purchase * * * voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such * * * city and county; * * * such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, *but shall not be issued or sold at less than par.*"

This provision contemplates the following matters:

1. That the interest-bearing paper may be issued to provide money to pay for machines, not alone that the interest bearing paper shall be issued directly to the seller of the machines in payment of the purchase price of machines.

2. That the paper may be long time paper bearing interest during the whole period, and shall either be itself payment or shall provide funds for payment.

3. That the paper shall have a definite maturity and not be paper payable on demand or when funds accrue,

i. e., not a warrant or a draft or order of one officer on another, nor a voucher.

4. That the paper issued shall be a general charge upon the city and county, not paper payable out of any particular fund or out of the taxes or revenues as they accrue.

5. That the interest-bearing paper may be issued or sold in the open market to provide funds.

6. That these provisions are all applied generally to the paper issued, whether it be bonds, certificates of indebtedness or other obligations.

The necessity for the issuance of negotiable interest bearing obligations is so overwhelming from the very provisions of the act itself, that there can be no reasonable doubt as to the existence of the power.

If, notwithstanding the considerations we have suggested, there remained the slightest doubt as to the power of the petitioner to issue the negotiable certificate sued on, it might be pertinent for us to call attention to certain observations made by Judge Dillon in his work on Municipal Corporations. Thus at Section 897 (5th edition) the learned author says:

> "In municipal bond cases the Supreme Court of the United States has rejected, when necessary to protect the bona fide holders of such securities, narrow and rigid constructions of statutes and charters authorizing the creation of such debts. * * * The result, moreover, has been of incalculable value to municipalities in general by establishing upon a firm foundation the credit of their securities issued for immediate permanent improvements, enabling them thereby to obtain money for these purposes on a lower interest basis than would otherwise have been possible; and for this the country at large is under lasting obligations to the wisdom, courage, foresight and sense of justice of the Supreme Court of the United States."

At Section 886 he says:

> "The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even when made on legal grounds deemed solid by the state courts as well as by the municipalities. That such securities have any general credit and marketable value left is largely due to the course of adjudication in respect thereto by the Supreme Court, and the reliance which is felt by the public that it will stand firmly by the doctrines equally just to the investor and beneficial to municipalities in general and to the public which it has so frequently asserted."

Finally, in a note to the text quoted (page 1402) he uses language which, even more than the foregoing quotations is peculiarly applicable to the facts of the case at bar. He says:

> "If the Supreme Court cannot be said to have adopted liberal constructions of statutes authorizing the issue of bonds, it may be indisputably affirmed that it has in such cases held the municipality firmly to the practical construction it had put upon the enabling acts, in cases where the acts fairly admitted of the construction adopted by the municipality, and the rights of bona fide holders were involved."

Here, then, was an enabling act whose ultimate purpose was to make it possible for municipalities to procure voting machines. To accomplish that end the legislature gave authority to provide, in a practicable way, for the payment of the machines by the issuance of the municipality's negotiable obligations. Not only would the purpose of the act have been seriously hampered, if not completely frustrated, by any other construction of the power conferred by making it difficult if not impossible to find takers for non-negotiable paper, *but the petitioner itself construed the act as conferring upon it the power to issue negotiable paper.*

In *Thomas* v. *Grand Junction* (1899), 13 Colo. App., 80, in construing liberally a statute authorizing the purchase of water works the court said at page 85:

> "The primary object of the statute was to permit the inhabitants of towns and cities to secure an adequate supply of pure water. * * * This being the case it is to be presumed *that the legislature desired to invest the people, who were themselves to bear the burdens of the expense, with every power necessary to supply this imperative want.*"

And again at page 87:

> "We think it to have been clearly the intent of the legislature to vest in the authorities of cities and towns, entire discretion as to the use of any and all of the means specified in the statute to supply this paramount necessity. Such a conclusion is not in contravention of any statutory or constitutional provision, but is in accord with the general tenor, purpose and interest of the legislature in its enactments in reference to and for the government of towns and cities. *The whole spirit of the law is so far as possible to permit under reasonable restriction the privilege of self-government.*"

It follows then necessarily that the defendant board had the power to issue as a negotiable instrument the instrument sued upon. That instrument is negotiable in form and therefore, it appearing beyond all question that the instrument was issued by proper authority and was before maturity for value endorsed and sold in due course of business in good faith to the respondent, who became and has ever since remained the *bona fide* holder thereof, there was no defense to this action. The court properly held that the third statement of defense stated no defense whatever, and that judgment was properly given for the plaintiff.

II.

THE ONLY QUESTION RAISED BY THE THIRD DEFENSE WAS THE NEGOTIABILITY OF THE CERTIFICATE SUED UPON. THE ORIGINAL VALIDITY OF THE CERTIFICATE WAS NOT CALLED IN QUESTION EITHER THERE OR ELSEWHERE IN DEFENDANT'S ANSWER. MOREOVER, EVEN IF THE POINT HAD BEEN RAISED BELOW, IT IS NOT TENABLE.

Under the "Third Point" of its brief in this court the petitioner argues that it was without authority to issue negotiable certificates of indebtedness; that the certificate here sued upon was negotiable in form; and that, therefore, the certificate is absolutely void.

To this argument there are two complete answers:

1. The question of the validity of the certificate in suit, assuming that it was raised at all in the trial court, was raised by the motion to direct a verdict and not by the third defense. Since the sustaining of the demurrer to the third defense is the only error attempted to be presented for the consideration of this court, it is apparent that the question of the validity of the certificate—as distinguished from the question of its negotiability—has no standing in this court.

2. The argument is absolutely fallacious, as a proposition of law.

As already has been pointed out the only question which was raised in the court below which the petitioner even attempted to raise either in the Circuit Court of Appeals or in this court was the one presented by the demurrer to the third defense. Whether even that question has been saved in such a way that it presents anything for the consideration of this court we shall not discuss here, but shall leave for a subsequent division of

our argument. But, even if the petitioner's entire contention were admitted as to the sufficiency of the record to present for review here the order sustaining the demurrer to the third defense, that question is the *only* one which the petitioner claims to have brought here.

With that fact in mind, we pass to a consideration of the contention that the certificate upon which suit was brought was not merely non-negotiable, *but was absolutely void.*

This contention proceeds necessarily and admittedly from the assumption that the petitioner was without power to issue negotiable certificates of indebtedness. If, therefore, it should be held—as in our opinion it must be—that the petitioner did have the power to issue as a negotiable instrument the certificate sued on, then of course, the question which counsel have argued under their "third point" can never arise. In such an event the validity of the paper and its negotiability are established, and the petitioner's case falls.

But, the petitioner contends, if it once be held that it was without power to issue the certificate as a negotiable certificate, the certificate must be held to have been absolutely void in its inception.

The primary difficulty with this point is, as we have suggested, that it is not properly brought to this court. The only questions saved were the questions raised by the plaintiff's demurrer to the defendant's third defense; and that demurrer raised, at the most, the question of the negotiability—and so, as counsel say, the power to issue negotiable paper—of the certificate. The third defense was a defense of failure of consideration, premised, as counsel have persistently claimed, on the theory, that the petitioner was without power to issue negotiable certificates of indebtedness and that, therefore, the cer-

tificate sued upon was in fact not negotiable. Upon that theory, and that theory alone, were the allegations of fact in the third defense tending to show failure of consideration, material. If that theory of the lack of legal authority to issue a negotiable certificate were sound, then the defense would be entitled to offer evidence of failure of consideration—a defense which, if established, would bar a recovery if the instruments were non-negotiable, but which would be unavailing if the instruments were negotiable (since they had passed into the hands of a bona fide purchaser).

The way, and the only way, in which prior to the trial the question of the *validity* of the certificates could have been raised *was by demurrer to the complaint.* Every fact having any bearing on the authority of the defendant to issue a negotiable certificate of indebtedness was of record as soon as the complaint was filed. The authority pursuant to which the certificate purported to have been issued was a statute of the State of Colorado, which of course did not have to be pleaded; while the certificate, showing that the instrument issued and sued upon was negotiable in form, was set out *in haec verba* in the complaint. Consequently, the complaint itself presented squarely—or would have, if demurred to—the question which the petitioner now seeks to raise, but to which no reference was made in the trial court. It was a purely legal issue as to which the allegations in the third defense were wholly immaterial.

If the defendant desired to test the sufficiency of the complaint, he should have done it by a demurrer; but the theory of the third defense was that the certificate of indebtedness was good as issued but that it was not, because it could not be, negotiable in fact, and that therefore it was a defense to the action that the considera-

tion had failed. The defendant did not demur because it did not then assert the rule of law now asserted.

This is evidently what the Circuit Court of Appeals means in the doubt it suggests as to whether the question of the void character of the paper arises under the third defense.

Now since the sole error argued in this court is the ruling of the court upon the demurrer to the third statement of defense, it follows that the petitioner has not raised in this court the question which it thinks it is entitled to raise.

But the defense suggested is not only not raised but is negatived by the third defense; it is also negatived and therefore not raised by the first and second defenses. The first defense denies that the plaintiff is the owner or transferee of the paper. This defense admits the validity of the paper but traverses merely the allegation of its transfer. The second defense admits the validity of the paper but pleads first plaintiff's non-ownership in fact, and the ownership of the payee, thus denying the transfer, and then attempts to plead failure of consideration. Thus it appears that the issues actually joined, taken with the failure to demur to the complaint, show that the contention now made is an afterthought.

The difficulty with the petitioner's case is very plain, and it all arises from a change in legal position between the trial in the lower court and the hearing in the Circuit Court of Appeals.

The petitioner now asserts the law to be that if the Board had the conceded power to issue non-negotiable certificates and instead thereof issued negotiable certificates, the paper is absolutely void, citing *Mayor* v. *Ray*, 19 Wall., 468; *Merrill* v. *Monticello*, 138 U. S., 673; *Hedges* v. *Dixon Co.*, 150 U. S., 182; *Swanson* v. *Ottumwa*, 131

Iowa, 547. This question, as we have shown, could be raised upon demurrer to the complaint.

But petitioner's position when it made its motion to strike, and pleaded its defenses was, as shown by its pleadings, that if the Board had the conceded power to issue non-negotiable certificates and instead thereof issued negotiable certificates, the paper is not void but is simply non-negotiable. It is needless to say that the latter proposition is the law.

When confronted with the complaint, the petitioner, recognizing the rule of law it then believed in, did not demur. Hence the petitioner's motion to strike out the word negotiable and its refusal to demur. It there recognized that the paper was not void.

When the defendant was required to plead, after its motion to strike was overruled, it pleaded, in accordance with its view of the law that the paper was simply non-negotiable but not void, three defenses. Each of the three is predicated necessarily upon the legal proposition that the paper had *prima facie* validity and *prima facie,* a consideration, the first defense recognizing its validity and negotiability, but denying plaintiff's ownership; the second recognizing its validity, but denying both its negotiability and plaintiff's ownership; and the third recognizing its validity but denying its negotiability by pleading facts which would have constituted a defense to non-negotiable paper, but not to negotiable paper, namely, failure of consideration.

The second statement of defense is therefore double. It contains two separate and distinct defenses and under the common law system it would have been demurrable for duplicity. It alleges first that the plaintiff is not the real party in interest, because it does not really own the paper. This is an argumentative denial of the plain-

tiff's *bona fide* ownership for value, and constitutes a complete defense in itself. The second defense then asserts failure of consideration. This, too, independently of the truth of the allegations of non-ownership, is a defense if the paper was in law or in fact non-negotiable. In other words, if the paper was non-negotiable in law or in fact the first part of the second defense was wholly unnecessary; but if it was negotiable, the second part of the defense was wholly unavailing, and it became necessary for the defendant to fall back upon the allegations of plaintiff's non-ownership. Therefore the second defense was a composite defense, embodying both the first and third defenses, and every particle of evidence admissible under either the first or third defense was equally admissible under the second defense. Strike out both the first and third defenses and the issues remained the same; it was yet open to the defendant to prove either defense: (1) that the endorsement and transfer of the paper to the plaintiff were colorable and not *bona fide*, and that the Federal Ballot Machine Company still owned the paper; and (2) that the paper was by law non-negotiable and therefore subject, even in the hands of a *bona fide* purchaser for value before maturity, to the defense of failure of consideration.

It is apparent, therefore, that neither in the third defense—which is the only one with which this court is concerned—nor in either of the others was the question of the *validity* of the paper raised. The only issues raised by the defenses were the ownership of the paper by the plaintiff, and the negotiable character of the paper.

Then the defendant went to trial on the above two defenses, both clearly defined, but it offered no evidence in support of either. On the contrary both parties, by

asking for a directed verdict, submitted the question of plaintiff's ownership of the paper to the court, which directed a verdict for the plaintiff. The presumption is that neither defense was pleaded in good faith, for the record overwhelmingly shows the untruth of the first, and the defendant offered no evidence to prove the second.

Thereupon, when the case was taken to the Circuit Court of Appeals, the defendant switched from the untenable positions taken in the trial court that the plaintiff was not the owner of the paper, and that the consideration had failed, to the still more clearly untenable one that the paper was absolutely void and could not be the basis of recovery in any event, regardless of the sufficiency of the consideration.

Having failed to demur to the plaintiff's complaint and thus raise the question, the defendant took only one step by which it can even be argued that it raised the legal question of the validity of the certificate in the trial court. That was by its motion to direct a verdict. And as to this the Circuit Court of Appeals was right in its doubt whether the point of the void character of the paper was ever suggested or argued to the lower court.

But even if it be admitted that the question was properly raised in the trial court, that fact can avail the petitioner nothing now, for the very obvious reason that by the specification of errors the error, if any, in refusing to direct a verdict for the defendant was waived, and the only questions saved were those presented by the demurrer to the third defense.

If the fourth, fifth and tenth errors, which are alone argued, are consulted, it will be seen that not one of them raises the question of the void character of the paper. The question does not arise on demurrer to the third defense for that admits the validity of the paper as we have

seen. The fifth error simply assigns the ruling that the paper was negotiable as error, not that the paper was void. The tenth error is too general.

The errors assigned in the Circuit Court of Appeals are:

First. That the court erred in denying defendant's motion to strike.

Second. That the court erred in overruling defendant's motion to strike out the allegation as to protest of the certificate.

Third. That the court erred in overruling defendant's motion to strike out the allegation as to protest of the coupons.

Fourth. That the court erred in sustaining the demurrer of the plaintiff to the third defense.

Fifth. That the court erred in ruling that the instruments sued on in the complaint were negotiable.

Sixth. That the court erred in overruling defendant's motion for a non-suit.

Seventh. That the court erred in overruling defendant's motion for a directed verdict.

Eighth. That the court erred in granting plaintiff's motion for a directed verdict.

Ninth. That the verdict was contrary to the evidence.

Tenth. That the judgment is contrary to the law.

Every one of these errors, except the fourth, fifth and tenth, is waived upon this argument in this court. The fifth error evidently refers to the ruling upon the demurrer. It therefore follows that the ruling upon the very point now urged made by the trial court upon the trial of the cause, where the question, according to petitioner's own claim, was raised and passed upon, has been waived.

However, clear as it is that the question, even if raised in the trial court, has not been preserved for the consideration of this court, it is not necessary to rely in our opposition to the contention, on technical grounds or questions of practice. The contention is unsound as a proposition of law. In fact the suggestion is so obviously without merit that, except for the diversified holdings of the courts of one State on the question, we should hesitate to argue it seriously or at any length.

As we have suggested, the question here under consideration can in no event arise except in the event of a holding that the petitioner was without power to issue negotiable certificates of indebtedness.

In this connection counsel for petitioner say in their brief (page 55):

> "It is, of course, well settled that if a municipality issues bonds or other obligations, negotiable in form, when no power has been conferred to utter negotiable instruments, the securities are void, and no recovery can be had on them as non-negotiable instruments."

In support of this astounding but "well-settled" rule of law, four cases are cited, three of which were decided by the Supreme Court of the United States and one by the Supreme Court of Iowa. To admit the possibility of counsel's having been ingenuous in citing, in support of their statement, the three cases decided by this court, would be to insult counsel's intelligence. Nor do we feel justified in wasting the court's time in discussing or analyzing the cases cited—for no analysis is required to demonstrate that the cases not only do not hold or intimate anything that justifies their use in this connection, but the inferences to be drawn from the cases tend in exactly the opposite direction.

If further evidence of counsel's disingenuousness were

required, it is readily found in their statement that the law is "of course, well settled," on that question. In view of the exhaustive investigation of the law which the petitioner's brief discloses, it is inconceivable that counsel did not know that the statement just made was a misstatement.

True it is, that the case of *Swanson* v. *City of Ottumwa* (1906), 131 Ia., 547, seems to support the proposition advanced by the petitioner; and that while other cases in Iowa have held differently, the Swanson case probably must be taken to state correctly the rule prevailing in that jurisdiction. But admitting that, we submit that the Iowa case is opposed both by every principle of law and logic and by the law of every other jurisdiction. And even in the Swanson case language is used which would save the certificates here in question from the damning operation of the rule. Thus the court said, arguendo:

> "Doubtless there are many cases, upon warrants negotiable in form, wherein recovery has been allowed; but such warrants are not in fact negotiable, and words of negotiability are, in such cases, clearly surplusage."

If in the case at bar the petitioner had no power to issue negotiable certificates then, of course, the words of negotiability are surplusage and the certificates may be treated as non-negotiable.

The basic fallacy in the Swanson case is in failing to discriminate between want of power to issue either negotiable or non-negotiable paper for a given purpose and want of power to issue negotiable paper merely. In the first case—which was the case in the authorities relied upon by the court—it is, of course, true that paper negotiable in form is absolutely void, *not because it was issued negotiable in form but because it could not lawfully have been issued in any form, negotiable or non-nego-*

tiable. In the second case the power to issue obligations being given, the obligations issued will be treated as good, but not as negotiable, obligations.

The distinction is pointed out clearly by Judge Dillon, who seems not to agree with the petitioner as to which way the law is "well-settled." In the Fifth Edition of his work on Municipal Corporations (Vol. I, page 531, note), in commenting on the *Swanson* case, he says:

> "If it is to be understood that if the bonds had not contained words of negotiability they would have been valid and recovery might be had thereon, but because, and only because, they are made negotiable in form they are wholly void, and no recovery can be had upon them, although the city has on the merits no defense thereto, it asserts a doctrine which we believe to be unsound, and one which is not necessary in the case supposed to protect the municipality, and which is manifestly unjust to the holder of such instruments. Such a doctrine is contrary to what is decided or declared in many cases, and one which we think will not obtain general judicial sanction. In a previous case the Supreme Court of Iowa laid down the true rule as follows: 'Where a municipal corporation has the power to bind itself by written obligation without the power to make the same negotiable, and it executes its written obligation making the same negotiable in form, it would not be void. It would result only that the instrument would not in fact be negotiable, and would lack the characteristics with which actual negotiability would clothe it.' *Sioux City* v. *Weare,* 59 Iowa, 95. * * * *A different rule would or might apply where there was no authority to create the debt or to issue any instrument whatever to evidence it.*"

In a note on page 543 of the same volume, Judge Dillon gives further expression to his view on the same question in the following language:

> "If the transaction is *infra vires* and the only excess of power is making the paper negotiable in form, the action may, we think be brought on the paper it-

self with the same effect as if it has been issued in non-negotiable form. See ante, Sec. 284. The cases are not uniform, and it has been held that though a debt be lawfully created, yet if for such debt *negotiable* bonds be issued (where there is no statutory authority to issue obligations in negotiable form), such bonds are void, and the holder cannot recover upon them as non-negotiable instruments. *Dodge* v. *Memphis*, 51 Fed. Rep., 165 (Thayer, J.). 'Suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received but has not in fact paid for because the securities issued in pretended payment were void.' Ib. This would be right if the bonds were void for want of any statutory authority *to create the debt* for which they were issued, but where there is such authority, and where, if the instrument is made in non-negotiable form, it would have been valid, why should the insertion of the words 'order' or 'bearer' make the same wholly void, and why may not the holder ignore the words of negotiability and sue upon the same with the same effect as if they were non-negotiable instruments, and thus open to all defenses which may exist whether the holder had notice thereof or not? See *Sioux City* v. *Weare*, 59 Iowa, 95; *Dively* v. *Cedar Falls*, 21 id., 565; *Clark* v. *Polk County*, 19 id., 248; *Pac. Imp. Co.* v. *Clarksdale*, 74 Fed., 528; ante, Sec. 284."

In *Pacific Improvement Co.* v. *City of Clarksdale* (1896), 74 Fed., 528, it was held that if a municipal corporation not authorized to issue negotiable bonds, does issue bonds, negotiable in form, in payment of a debt which it had power to contract, recovery may be had on such bonds, although they are, of course, subject, even in the hands of third parties, to equitable defenses.

There the Circuit Court of Appeals for the Fifth Circuit said at page 534:

"The debt or obligation due to the railway company at the time the settlement was made between the defendant and the railway company was still outstanding, and it was clearly the duty and right of

the defendant city to use such means in liquidation thereof as might be lawful in the discharge of any of its existing indebtedness. It was lawful, in the defendant, in settlement of its existing indebtedness, to give its promissory obligation to pay on such terms as the creditor might be willing to make. Conceding there was no power in the defendant to bind its constituency to the payment of commercial securities, as these bonds purport to be, it does not follow that—when such bonds were given in payment of a lawful debt, and the settlement of such debt is shown to have been the purpose for which the bonds were issued, and it is further shown that the mayor, being duly authorized by valid ordinances, signed and delivered the same to the creditor agreeing to take them—the defendant can escape the payment of the debt or obligation which is evidenced by such promises to pay, because, or on the ground that, the city authorities gave negotiable, instead of non-negotiable promises to pay to the creditor. On the contrary, when negotiable securities, instead of non-negotiable instruments, have been employed in settlement of lawful debts, the negotiable bonds so given have, when they were being sued upon, been treated, in a number of reported cases both in federal and state courts, as evidences of the debt, and on them, in the hands of third parties, recovery has been had against such defendant corporation."

In *Holmes* v. *City of Shreveport* (1887), 31 Fed., 113, the court said:

"But defendant contends that such bonds as these purport on their face to be, when issued for anything or to any person, are void. Conceding it to be true that the corporation had no authority to execute notes or bonds for any purpose, which would be entitled judicially to the protection of the law-merchant, does it follow that where the city's agents and all the parties to a *contract sanctioned by law agree to give and take such instruments* as would be so protected, that the instruments so given, are now held against defendant, are for all purposes void? Will the fact that those agents exceeded their power *only* in agreeing to give such instruments, or ex-

> ceeded their power *merely and only* in the selection of the means of evidencing the debt due the contractors, invalidate and extinguish the obligation lawfully incurred by the corporation? If no debt, sanctioned by the law, could be incurred for such public work as the grading and otherwise improving the city's streets then it would be a matter of no consequence to the city, or to the constituents of the corporation, what sort of evidences of the debt were issued to the persons doing the work, for the plea *ultra vires* would shield them against the debt. But the plea, if the debt is lawfully due and unpaid, will not protect the corporation against the payment of the debt because *of an irregularity or error* on the part of the city's agents *in giving commercial notes instead of non-commercial vouchers or warrants.* To give such an effect to the plea, whoever may be the parties to the contract, or whatever may be the irregularities in the instruments used to evidence a lawful debt, would be as unwarranted in good conscience as it would be novel in the administration of justice."

The Supreme Court of the United States was called upon to consider the same question in *Claiburne County* v. *Brooks* (1884), 111 U. S., 400. There Claiburne County, which had been given authority to build a court house, but had no express power to issue negotiable bonds, had issued bonds, negotiable in form, upon which suit was brought by a *bona fide* purchaser for value before maturity. The county offered evidence of payment, which it was conceded would have afforded a perfect defense against the original holder, and—in case the bond was non-negotiable—likewise against any subsequent holder. It became important, then, to determine whether the bond could be treated as having the attributes of negotiable paper, so as to cut off the defense of payment. The trial court charged the jury on the theory that the power to build a court house involved necessarily the power to issue negotiable paper to raise the money therefor, and

allowed a recovery. The Supreme Court held that the county was without authority to issue negotiable paper, and reversed the judgment and remanded the case for a new trial, thereby making it possible for the county to prove its defense of payment.

Not only did the court by remanding the case for a new trial negative any possible theory that the paper was *void,* but it said:

> "* * * the power to issue vouchers for payment is necessarily implied; but no power is given to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities. No such power is expressly given, and in our judgment no such power is necessarily implied. The document sued on in this case may very well have served the purpose of a voucher to show a stated account as between Sturm and the County, and may be of such form as to be assignable by indorsement, but it must always be liable, in whosesoever hands it may come, to be open for examination as to its validity, honesty and correctness."

If it had been *void* because issued negotiable instead of non-negotiable in form, there would have been no occasion to comment on its liability to inspection in the hands of subsequent holders.

In *Dorian* v. *City of Shreveport* (1886), 28 Fed., 287, the court came to the same conclusion. There it was said, at page 292:

> "Considering it established that the defendant was fully authorized * * * to acknowledge her indebtedness to R. & B. [the payees of the bonds], and recognizing her inability to issue for any purpose commercial paper—can the fact that the mayor and trustees (the city's agents) saw fit to issue paper purporting, as in this case, to be a commercial instrument, instead of a non-negotiable promise to pay, *invalidate* the obligation which the law imposed on the city * * *?"

In answering the query in the negative, the court said at page 295:

> "Under the authority presented in the cases cited, particularly in *Claiburne Co.* v. *Brooks*, we are warranted in treating the bonds held by Dorian 'as vouchers for money due—certificates of indebtedness for services rendered, or for property furnished, for the use of the city'—and Dorian, under the authorities following, stands in the shoes of the original payee."

We submit, therefore, that the point counsel urge under their Third Point, if raised at all in the trial court was raised not by the demurrer to the third defense, upon the ruling on which is predicated the sole error assigned but by a motion to direct a verdict, which has been waived; that, therefore, the question is not before this court; but that even if the question were properly here, the petitioner's contention must be overruled, since the sole effect of a holding that the Board of Commissioners of the City and County of Denver had no power to issue a negotiable certificate of indebtedness, would be not to make void the certificate here sued on, but merely to make it non-negotiable.

In such case no defense being proven to the paper on the trial, the verdict must stand, and the judgment is correct.

III.

THE CERTIFICATE OF INDEBTEDNESS WAS NEGOTIABLE IN FORM AND WAS NOT, AS CONTENDED BY THE PETITIONER, A NON-NEGOTIABLE WARRANT.

It is difficult to treat seriously the contention of the petitioner that the certificate sued upon was not in form a negotiable instrument. It argues through fifty-six pages of its brief to prove that the certificate is absolutely void because it is palpably negotiable in form, then in its fourth point it takes the position that this certificate of indebtedness is not negotiable in form but a mere warrant.

A negotiable instrument has been defined to have the following characteristics. It must contain either a direction or promise to pay a sum certain, on a day certain; it must have certainty as to parties and must be payable generally and at all events, out of funds either of the maker or of the person upon whom it is drawn.

It is said by petitioner that a bond is a new debt, or constitutes the evidence of a new debt, while a warrant or certificate of indebtedness is merely the evidence of a debt already contracted. This depends, as to a certificate of indebtedness, wholly upon its form. If it is in form a warrant it is, of course, a warrant. But if it is in form a negotiable instrument it is, whatever its consideration, in itself evidence of a debt, and the instrument itself creates the debt. The consideration might be an existing debt or a contemporaneously contracted debt. Thus a refunding bond is no less a bond because it shows a debt already contracted. Then the petitioner cites three quotations from 2 Dillon on Municipal Corporations, 5th Ed., 1284, 1273, 1295, and the language of *Watson* v. *City of Huron*, 97 Fed., 449, *Nashville* v. *Ray*, 19 Wall.,

468. But the language both of the text books and the opinions applies to warrants or to orders by one county officer on another or drafts by one county officer on another or to warrants issued containing no promise to pay, and the authorities, of course, have no application.

Prior to the year 1906 the only obligation for the payment of money expressly authorized by the constitution and statutes of Colorado other than the bonds authorized by constitutional and statutory provisions, was the county warrant which is specifically defined in the provisions of Section 801, Mills Annotated Statutes of Colorado (printed in the appendix hereto). This section provides substantially that all claims and demands held against a county shall be presented to the Board of County Commissioners for audit and allowance before an action in any court shall be maintainable, and that all such claims, when allowed, shall be paid by "a county warrant or order drawn by said Board on the county treasury, upon the proper fund in said treasury, for the amount of such claim."

The section further provides how such warrant shall be signed and attested, presented and countersigned. The section also provides that the general county fund shall be known and designated on the books of the county treasury as the "ordinary county revenue fund," and that the road fund shall be known and carried on the books as the "road purposes revenue fund." This section also provides that such warrants shall *be payable on demand,* shall be drawn and issued upon the county treasurer or against any funds in his hands, only when at the time of drawing and issuing the same there shall be sufficient moneys in the appropriate fund in the treasury to pay such warrant, and that whenever there are no moneys in the county treasury to the credit of the

proper fund to meet and defray the necessary expenses of the county, the Board of County Commissioners may provide that such warrants may be drawn and issued against and in anticipation of the collection of taxes already levied for the payment of such expenses to the extent of eighty per cent. of the total amount of the taxes levied. It is also provided in that section that such warrants shall show upon their face that they are payable solely from the fund upon which the same are drawn, and the taxes levied to form the same when collected, but not otherwise, and that such warrants shall be paid only by, through and from the fund drawn upon, and the collected and uncollected taxes levied, appropriated, collected or paid into the county treasury to create, constitute and form such fund. It is also provided in that section that such warrants shall not operate as a debt of the county and shall not be held to add to or increase the debt or indebtedness of the county.

Prior to the year 1906 such county warrants and the bonds issuable under Section 6 of Article XI of the Colorado constitution (printed in the appendix hereto) and Section 935 Mills Annotated Statutes of Colorado, and Section 934, Mills Annotated Statutes of Colorado (both sections printed in the appendix hereto), were the only evidences of indebtedness which counties could issue under express provisions of law. But in that year the provision as to voting machines was passed and adopted as a part of the constitution, as amended Section 8 of Article VII of the Constitution.

Now it is perfectly plain from these provisions that a county warrant is a wholly different thing from the certificate of indebtedness provided for by the constitutional amendment of Section 8 of Article VII. It is also perfectly plain that these certificates of indebtedness are negotiable in form.

Moreover, the authorities are uniform to the effect that such a certificate as was here given is in form a negotiable instrument.

In *School District* v. *Hall* (1895), 113 U. S., 135, the court said:

> "The decisions of this court are numerous to the effect that municipal bonds in the customary form, payable to bearer, are commercial securities, possessing the same qualities and incidents that belong to what are strictly promissory notes negotiable by the law merchant. There is no reason why such bonds, issued under the authority of law, and made payable *to a named person or order*, should not, after being indosed in blank, be treated by the courts as having like qualities and incidents. That they are so treated by the commercial world cannot be doubted."

The following cases also hold that certificates having the characteristics possessed by the one here involved are negotiable in form:

City of Cripple Creek v. *Adams*, 36 Colo., 320.
Humboldt Township v. *Long*, 92 U. S., 642.
Gelpcke v. *Dubuque*, 1 Wall., 175.

IV.

THE RULING OF THE CIRCUIT COURT OF APPEALS UPON THE NECESSITY OF AN EXCEPTION TO THE SUSTAINING OF THE DEMURRER TO THE THIRD DEFENSE, WHILE IMMATERIAL IN THE CASE, IS YET JUSTIFIED BY THE AUTHORITIES.

The petitioner has mistaken the question. It argues in its brief the question as to whether upon the sustaining of a demurrer to a single plea upon which plea the party pleading it stands, and which ruling upon the demurrer eventuates in a judgment, requires a bill of exceptions or an exception on the record to be made in order that

it may be reviewed. We readily concede that such an error is apparent on the record and needs no exception for its review upon error. The question here is totally different. It is whether an exception ought to be entered on the record to the sustaining of a demurrer to one of several pleas where the action proceeds to trial upon the other pleas and the same evidence that could have been offered under the plea to which the demurrer is sustained could have been offered under some other plea upon which the court proceeds to trial.

The petitioner in its brief states a great deal of matter which is not only bad law but is very bad legal history. It is not disputed that since the statute of Westminster II. there have been two records, one the common law record, the other the statutory record provided for by the statute of Westminster II. But to say that the bill of exceptions for reserving exceptions as to evidence and instructions dates from the statute of Westminster II. is, historically speaking, absurd. At that early period of 1285 we find a court where there were no written pleadings made up and filed prior to the trial. The term demurrer was unknown in the law but the sufficiency of every pleading was passed upon by the court before any entry as to that pleading was made on the record. The clerk of the court made the record and entered the pleadings after they had been adjudged good. A cursory reading of the Year Books of that time shows that objections were made then as they are now, first, to the writ, either by matter of law or by matter of fact; then to the statement of the plaintiff's case, either by matter of law in abatement, because of a variance from the writ, or by matter of law to the merits of the plaintiff's claim, or by matter of fact to the merits of the plaintiff's claim. The objection to any pleading was

taken orally in court and was called an exception (exceptio), a term borrowed from the canon law, as based on the Roman civil law. If the objection was held bad it never appeared on the record at all. If held good, either the writ was quashed or judgment was given by the court, as the case might be. The clerk of the court made up the record, and the objection was shown on the record as an exception sustained and judgment thereon. Since if held bad the objection never appeared on the record at all, but if held good it always resulted in a judgment in that particular action, it is plain that every objection in point of law, *i. e.*, our demurrer, was apparent on the record. The objection held bad never appeared on the record because every such exception was waived by pleading higher matter. Hence if a man pleaded matter of fact to a count or declaration he waived the exception of matter of law.

Now it is not disputed that since the date of the statute of Westminster II., and long before that, as shown by Bracton's Note Book, an exception either to the writ or to the count or declaration, or to the plea, for matter of law, which was held good, and which eventuated in the judgment and was the ground of the judgment, never required any exception at all on the record. But at that time there was no jury trial. The jury did not hear evidence. Their verdict was the evidence in the case. They performed the witness function themselves. There could not be any exceptions to the admission or rejection of evidence. The rules of evidence were unknown. Instructions to the jury, in the sense of instructions to them as a judicial body passing upon the facts, were unknown, and as to all matters of pleading, if the case got to an issue of fact to be submitted to an assize, or to an assize turned into a jury by consent, no question or ruling

as to the sufficiency of any pleading could appear on the record at all. It was theoretically and practically impossible until centuries had passed and the motion in arrest of judgment was invented.

But later after two hundred years, when the jury became a judicial body and heard the evidence of witnesses, after it had become the custom to file written pleadings, the same exceptions remained to the proposed pleadings, but the exception to the sufficiency of any pleading in point of law came to be named a demurrer, taken from the old phrase for a postponement or delay upon the making of an exception that "the parol demurs," *i. e.*, that the pleading waits.

But the rule still remained that a demurrer was to the merits of the pleading in point of law, and superseded and waived every prior objection, and the plea of matter of fact to the merits waived the objection by demurrer in point of law to the merits. Nevertheless, if a party demurred to the declaration, his demurrer, still an exception, if held good ended the action, but if held bad judgment went against him. In either case the demurrer eventuated in a judgment. The existence of written pleadings not passed on preliminarily by the court, had superseded the old rule of first trying your point with the court to see whether it was good or bad; now a party demurred at his peril.

Under this procedure it is apparent that any demurrer, either to a plea or to the declaration, ended the action one way or the other. The party was not permitted to choose whether he should first take issue upon point of law, and if that went against him, then take issue on point of fact.

In process of time came modifications. First came the rule that the general demurrer at any stage would be

carried back to the first bad pleading and judgment given accordingly. Of course, no exception on the record was needed because the ruling ended the action by a judgment and the demurrer eventuated in and was the sole ground of the judgment.

Next came the modification of allowing several counts in the declaration with the probable requirement of separate pleas to the separate counts, and finally also came the statutory modification of allowing several distinct pleas to the same count of the declaration. Judgment could now no longer be given either upon the overruling or sustaining of a demurrer unless the demurrer was of such a character that it ended the case and eventuated in a judgment. If the demurrer was sustained to one of several counts it could no longer end the action. The case proceeded on the other counts. And if the demurrer was sustained to a particular plea it no longer ended the action because the cause proceeded upon the other plea or pleas to trial.

But the rule remained that by pleading matter of fact after a demurrer overruled, the exception as to the overruling of the demurrer was waived and the exception was no less waived by amending after demurrer sustained. It was only when the party stood upon his demurrer that the ruling was of any moment, and there came also the further ruling that if one of the pleas pleaded was the general issue which puts in issue the whole declaration, the demurrer could not be carried back to the declaration over the general issue. And since any specific plea traversing a material allegation of the declaration was demurrable as amounting to the general issue, the consequence was that the demurrer could not be carried back to the declaration except in case of a special plea in bar.

In this situation it still remained true that a demurrer

upon which, as either sustained or overruled, judgment was given by the refusal of the party to plead further, no exception was needed or required, because the ruling upon the demurrer was the sole ground of the judgment and so showed upon the face of the record.

Confining now the consideration of this matter to the case of demurrers to pleas to a declaration, if the demurrer did not end the action but left it to proceed on issues raised by another plea or other pleas, the situation that could arise was as follows:

If the demurrer was overruled the plaintiff demurring might take leave to plead matter of fact in reply to the plea or might join issue upon it and the ruling on the demurrer was thereby waived. But if the demurrer to the plea was sustained the defendant might stand on his demurrer and refuse to plead further. If he did, that particular line of issue was ended but if the action proceeded to trial on other issues the ruling upon the demurrer might or might not be material, depending upon whether material evidence was excluded upon the trial.

If the demurrer was sustained to one of several pleas it would result always, in case the general issue was pleaded or another separate plea was pleaded that the case would proceed upon the other plea, and if the party to whose plea the demurrer was sustained desired to stand upon that particular plea which was held bad, it became customary to enter an exception to the ruling upon the record, not by bill of exceptions but written on the record by the clerk in order to show that the party stood upon his plea. But in such a case, if the evidence admissible under the particular plea was admissible under some other plea, the party whose plea was held bad must nevertheless introduce upon the trial his evidence under his other plea, and test the whole qustion either

by a demurrer to evidence, or as we say now, a motion for an instructed verdict, or if the defect was matter of law apparent upon the common law record, by a motion in arrest of judgment, or by a motion for judgment *non obstante veredicto*, and this is the genesis of the rule that the party must except on the record to a ruling sustaining a demurrer to one of several pleas and of the further rule that the sustaining is immaterial if there is some other plea under which the evidence can be admitted, and it was never permitted to a party to play fast and loose with the court and to refuse to introduce evidence when he had a clear chance under his pleading to introduce it upon the trial.

Now therefore it is apparent why the rule is as it is, namely, that a demurrer to a plea which eventuates in a judgment and is the basis of the judgment, requires no exception upon the record, while a demurrer to a plea which is not the basis of a judgment and does not eventuate in a judgment does require an exception upon the record, because it is the way in which a party announces that he intends to stand by that plea and that plea, if stood by, will avail him if by reason of the demurrer to the plea being sustained he is precluded from offering material evidence upon the trial.

The basic reason for the rule evidently is that in the case of a demurrer eventuating in a judgment the error if any, is apparent, while in the other case of a demurrer to a plea sustained where the case proceeds to trial, the proceedings on the trial may have rendered the whole matter immaterial. Hence in regard to such a claimed error the party alleging error must show first his exception and second prejudice upon the trial by the exclusion of evidence admissible under the particular plea held bad.

That this is the rule has been recognized by this court in *German Alliance Insurance Co.* v. *Hale*, 219 U. S., 307, where the court points out the necessity of an exception to the sustaining of a demurrer to a plea where the case proceeds to trial upon other pleas. And there the court shows the further rule that the ruling on demurrer as to that particular plea becomes immaterial if it does not prejudice on the trial.

Any other rule would make a trial of an action a mere game where a party could sit by with evidence decisive of the action and refuse to offer it when he had a clear chance to do so, because at some anterior stage of the case a judge had ruled upon a pleading which was not material to the case and the judge, at the time of ruling, had relied upon the fact that upon the trial the same question would come up upon the matter of evidence, and that the party could then test the point of law when the evidence was in.

The authorities cited by the petitioner upon this question really establish the rule as stated above. The case of *Rogers* v. *City of Burlington*, 3 Wall., 654, states the exact point where it is said:

> "It is well settled that the ruling of the Circuit Court in sustaining or overruling a demurrer to a declaration *and rendering judgment for the wrong party*, may be re-examined in this court by writ of error without any formal bill of exceptions."

This is precisely the point. Where the ruling upon the demurrer results in the rendering of judgment for one party or the other and is the basis of the ruling, the demurrer is itself the sole ground of the judgment and from the earliest days no exception was required.

The case of *Suydam* v. *Williamson*, 20 How., 427, is carefully confined to a demurrer sustained to a material portion of the pleadings, and it is apparent that the court

is speaking of a demurrer which eventuates in a judgment.

The case of *Gorman* v. *Lennox*, 15 Pet., 115, concerns a plea of performance filed to a declaration on a replevin bond. The cause was tried on a plea of set off and after verdict for the plaintiff the demurrer was sustained to the plea of performance. The court said:

> "The demurrer to the plea of general performance seems not to have been decided until after the verdict was rendered. As this plea was clearly bad, the demurrer was very properly sustained by the court.
>
> "A demurrer being filed, the rule is that the party who has committed the first fault shall have judgment against him. And on this demurrer a question is raised as to the sufficiency of the declaration."

The court then holds the declaration sufficient.

In that case on the trial all evidence of the defendant under the plea of set off was excluded, so that the sole question was an assessment of damages under the declaration for want of a sufficient plea. Therefore the case was the same as if the plea of performance were the sole plea, demurrer sustained, and judgment for plaintiff for the penalty of the bond to stand as security for satisfaction of the amount of damages to be assessed by the jury. In other words it is a case of judgment upon demurrer sustained, where no exception is necessary.

The case of *Aurora* v. *West*, 7 Wall., 82, was a suit upon coupons of bonds for a sum certain and demurrer to rejoinder to replication to a plea, where the demurrer was sustained. Also there was a demurrer to the tenth replication overruled. To the tenth replication after demurrer overruled, no rejoinder was filed but the cause was left on the pleading with a demurrer overruled and no further pleading filed by defendants. The court say:

> "Statement in the bill of exceptions is, that the parties submitted the case to the court and upon the

record therein set forth; but it is obvious that, when it was submitted, there was nothing left to be done except to compute the damages."

And again the court says:

"Every issue of fact having been withdrawn, and every issue of law in which the other pleadings terminated having been decided in favor of the plaintiffs, they were clearly entitled to judgment on the first count. Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below in overruling the demurrer of the defendants to the tenth replication of the plaintiffs and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs.

"Such being the state of the case the decisions of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon material pleadings on which the cause depends."

We say then that here is another case of a demurrer where the ruling upon demurrer without more forms the sole reason of the judgment. No exception of course was necessary.

The case of *Mitsui* v. *St. Paul, etc., Ins. Co.*, 202 Fed., 27, 29, decides on the authority of *Teal* v. *Walker*, 111 U. S., 242, that the general demurrer to a declaration is not waived by pleading over after the demurrer is overruled, and that the objection that the declaration fails to state a cause of action and clearly shows that plaintiff cannot recover may be assigned for error without saving an exception to the ruling upon demurrer. This also must be true for such an error inheres in the record and is not waived. It can be raised by motion in arrest of judgment or by motion for judgment *non obstante veredicto.* So here if the defendant had filed a general demurrer which had been overruled and then he had pleaded over,

he could now argue the point of no power in the defendant to issue the paper and its void character under the law.

V.

THE POINT RAISED BY THE DEMURRER TO THE THIRD DEFENSE WAS IMMATERIAL IN ANY EVENT, SINCE THE SAME QUESTION WAS RAISED BY THE SECOND DEFENSE. THEREFORE THE RULING OF THE CIRCUIT COURT OF APPEALS THAT AN EXCEPTION WAS NECESSARY TO PRESERVE THE RULING ON THE DEMURRER LIKEWISE IS IMMATERIAL.

We already have stated at some length the theory upon which was predicated each of the defendant's three statements of defense; that the second defense alleged both failure of consideration and plaintiff's non-ownership of the certificate; and that the third defense alleged only failure of consideration. It is apparent, therefore, that in no view of the case was the defendant prejudiced by the ruling on the demurrer to the third defense. Since the same defense was presented squarely by the second statement of defense, upon which the defendant went to trial, the ruling on the demurrer to the third defense clearly became immaterial.

Assuming that the third statement of defense stated a tenable defense—which presumably it would have if the certificate had been in law or in fact non-negotiable—the second statement of defense was good upon precisely the same theory. In that case the allegation whereby the bona fide character of plaintiff's ownership was negatived would have been surplusage, and would not have affected the validity of the other distinct defense urged.

It has been decided in the case of *Chambers County* v. *Clews*, 21 Wall., 317, that where a demurrer to a plea was wrongly overruled, the error was a harmless one if

the defendant had another plea which covered the same ground and presented the same issue. Now, in this case the second defense and the third defense were in identical words so far as the third defense went. All the evidence that could have been offered under the third defense was admissible and could have been offered under the second defense, but the defendant offered no evidence whatever under its second defense. The defendant did not attempt to substantiate any part of that second defense, but it did rely as it now says, upon the same issue of law precisely that it relied upon on the argument of the demurrer to the third defense, namely, that there was no power to issue negotiable certificates and they were, therefore, void. It is too plain for words that the ruling upon the demurrer did not prejudice the defendant in any way, because the only point which it desired to make, it raised upon the trial but now in this court it waives the claimed errors committed and the exceptions taken upon the trial. To the same effect as the case last cited are the cases of *Grand Chute* v. *Winegar*, 15 Wall., 355, and *German Alliance Insurance Co.* v. *Hale*, 219 U. S., 307.

The court in passing upon the third defense might very well have said that all that was in the third defense was in the second defense and the ruling here will make no difference since the defendant under its second defense can offer all the evidence which it claims, and if it has such evidence, can then raise the law point upon the trial by the necessary implication from a motion for an instructed verdict. As a matter of fact the same point was raised on the trial and the ruling upon the demurrer was therefore in the judgment of the court wholly immaterial.

The Circuit Court ruled that the plaintiff gave evidence

in support of its cause of action which, in the absence of proof by the defendant sustaining its second defense, even if the instrument was not negotiable, would entitle the plaintiff to recover. This means that the defendant deliberately took its chances upon the trial. It offered no evidence whatever. It made no effort to show any failure of consideration, as it could have shown under its second defense if it had the evidence. It was in no way circumscribed in the proof which it could offer, because everything admissible under the third defense was admissible under the second defense. Under the petitioner's then claim as to the law, as soon as the defendant proved failure of consideration under its second defense, it was entitled to a verdict, even if the paper was in the hands of a bona fide indorsee for value, if their contention under their third defense was sound. Under the petitioner's claim now, the defendant had to prove nothing. The paper was void on its face. Having deliberately chosen not to prove its second defense to any extent, it chose to rely upon its motion for a directed verdict or its motion for a non-suit.

The defendant, having deliberately chosen its own course and now having waived any errors in the rulings made on the trial and saved by its bill of exceptions, certainly cannot go back to an immaterial ruling upon a demurrer.

VI.

Conclusion.

We have felt it our duty to show that the decision of the Circuit Court of Appeals was sound, and incidentally to vindicate its ruling upon a particular point of appellate practice. We have also shown that according to the record the argument as to the void character of the paper

probably was not presented in the trial court, since it contradicts the whole theory of the defense. We have also shown that the errors which by possibility might raise the point are waived in this court. But, these questions aside, we place full reliance upon the proposition first argued, that there was power in the municipal authorities to issue the paper sued on, negotiable in form and clothed with all of the attributes usually possessed by negotiable paper.

We respectfully submit therefore, that the judgment of the Circuit Court and of the Circuit Court of Appeals is right and should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 8 of Article VII of the Constitution of Colorado, as amended in 1906, reads as follows:

> "When the governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine, or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par."

Section 2342 of the Revised Statutes of Colorado of 1908, provides as follows:

> "The governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, adopting and purchasing a voting machine, or voting machines, may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligation, which shall be a charge upon such county, city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time, or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par."

Section 6 of Article XI, Colorado Constitution, is as follows:

> "Section 6. No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing pub-

lic roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *Provided*, That any county in this state which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness, provided the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this state for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be is-

sued and provision made for their redemption in the same manner as provided in said law."

Section 934, Mills' Annotated Statutes, is as follows:

"934. Debt for Roads, Bridges—Election—Proceedings—Canvass of Election—Aggregate Amount. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is created, submit the question to a vote of the people at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words 'for county indebtedness,' or 'against county indebtedness'; such ballots to be deposited in a box provided by the county commissioners for that purpose; and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and if, upon canvassing the vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county; *Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to-wit: counties in which the assessed valuation of property shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, twelve dollars on each thousand dollars thereof. (G. L. '77, p. 223, sec. 448; G. S. '83, pp. 286, 287, sec. 671.)"

Section 935, Mills' Annotated Statutes, is as follows:

"935. County Commissioners May Issue Bonds—Limitations — Interest Tax — Redemption Funds. The county commissioners, when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of the county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million dollars, payable at the pleasure of the county ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate of not exceeding ten per cent per annum from their date until paid, said interest payable on the first day of April of each year, or semi-annually on the first day of April and first day of October in each year; such interest and principal, when due, to be payable at the office of the county treasurer of the county, or in New York City, at the option of the holders of the bonds; and the county commissioners shall prescribe the form of said bonds, and the coupons thereto, and to provide for the interest accruing on the bonds, they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds, they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent of the whole amount of such bonds issued; and all taxes for interest on and the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund, to be used in the payment of interest on and redemption of such bonds only; such taxes to be levied and collected as other taxes. (L. '89, p. 103, sec. 1, amending G. S. '83, sec. 672; G. L. '77, p. 224, sec. 449.)"

Section 801, Mills' Annotated Statutes, is as follows:

"801. How Claims Against County Shall Be Presented and Paid—Forms of Warrants—Limitations. All claims and demands held by any person against a county shall be presented for audit and allowance to the Board of County Commissioners of the proper county, in due form of law, before an action in any

court shall be maintainable thereon, and all claims, when allowed, shall be paid by a county warrant or order, drawn by said board on the county treasury, upon the proper fund in the said treasury, for the amount of such claim. Such warrant or order shall be signed by the chairman of the board, permanent or temporary, attested by the county clerk, and when presented to the county treasurer for registry, be countersigned by him; said warrant or order shall specify the amount and value of the claim or service for which it is issued, and be numbered and dated in the order in which it is issued. The general county fund shall be known and designated on the books of the county treasury as the 'ordinary county revenue fund,' and the general road fund shall be known and carried on the books of said county treasury as the 'road purposes revenue fund.' Such warrants and orders, payable on demand, shall hereafter be drawn and issued upon the county treasurer, or against any funds in his hands, only when at the time of drawing and issuing the same there shall be sufficient moneys in the appropriate fund in the treasury to pay such warrants and orders. Whenever there are no moneys in the county treasury of a county to the credit of the proper fund to meet and defray the necessary expenses of the county, it shall be lawful for the Board of County Commissioners of such county to provide that county warrants and orders of such county may be drawn and issued against and in anticipation of the collection of taxes already levied for the payment of such expenses, to the extent of eighty per cent of the total amount of the taxes levied; *Provided,* That warrants and orders so drawn and issued, under the provisions of this section, shall show upon their face that they are payable solely from the fund upon which the same is drawn, and the taxes levied to form the same when collected, and not otherwise. County warrants and orders may be in such form as the county commissioners may provide, and may be made payable to the order of the payee, or to the bearer. The person or persons to whom such last-named warrants and orders shall be allowed and delivered shall be held to have accepted the same in full payment and satis-

faction of the claim, to pay which the same was issued, and the obligation of said warrants is hereby limited as stated, and said warrants shall be paid only by, through and from the fund drawn upon, and the collected and uncollected taxes levied, appropriated, collected or paid into the county treasury to create, constitute and form said fund, and the taxes provided by law therefor shall be covered into said fund until all warrants drawn shall be fully paid, satisfied and discharged, both principal and interest. Said limited and last-named warrants and orders shall not operate as a debt of said county, and shall not be held to add to or increase the debt or indebtednss of said county; *Provided,* That the provisions of this law shall in no wise affect the lawful warrants and orders of any county which were issued prior to the passage of this law, and are outstanding and unpaid, but such warrants, unless redeemed under the funding statute, shall first be paid, both principal and interest, in the order of their registry. (L. '87, p. 241, sec. 2, amending G. S. '83, sec. 546; G. L. '77, p. 229, sec. 463; see R. S. '68, p. 171, sec. 25.)"